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CALIFORNIA GOVERNMENTAL TORT LIABILITY AND THE COLLATERAL SOURCE RULE

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INTRODUCTION

The California Supreme Court in 1961 abrogated the common law doctrine of governmental immunity in the landmark case of *Muskopf v. Corning Hospital District*.[1] After a two year moratorium period, during which time the legal and fiscal problems created thereby were studied by the California Law Revision Commission,[2] comprehensive legislation applicable to all public entities was enacted. This legislation is commonly known as the California Tort Claims Act of 1963.[3] The basic principle underlying this law is that public entities may be held liable only if a statute declares them liable, *i.e.*, all common law or judicially declared forms of liability are abolished.[4]

In over five years of operation under the 1963 act, numerous decisions interpreting it have been handed down. The first cases were primarily concerned with the constitutionality and retroactivity of the act.[5] Without exception, the courts have upheld its validity

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1 55 Cal. 2d 211, 359 P.2d 457 (1961). The *Muskopf* decision has received considerable attention by legal commentators. *See, e.g.*, Kennedy & Lynch, *Some Problems of a Sovereign without Immunity*, 36 S. CAL. L. REV. 161 (1963); Note, *Torts: Governmental Immunity*, 9 U.C.L.A.L. REV. 266 (1962); Note, *Torts: Sovereign Immunity: Scope of Doctrine Severely Limited in California*, 49 CALIF. L. REV. 400 (1961); Comment, *Governmental Immunity from Tort Liability*, 34 S. CAL. L. REV. 346 (1961). *See also* Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963); and Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963).

2 Cal. Stats. 1961, ch. 1404, effective September 15, 1961; 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 801 (1963); 5 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 1 (1963).

3 Cal. Stats. 1963, ch. 1681, which enacted California Government Code sections 810-895.8, and Cal. Stats. 1963, ch. 1715, which enacted California Government Code sections 900-978.8. Although the act has no official title, the supreme court has referred to it as the 1963 Tort Claims Act in *Johnson v. State*, 69 A.C. 813, 447 P.2d 352 (1968) and *Becker v. Johnston*, 67 Cal. 2d 163, 430 P.2d 43 (1967).

4 CAL. GOV'T CODE § 815 (West 1966); Datil v. Los Angeles, 263 A.C.A. 717, 69 Cal. Rptr. 788 (1968); Sava v. Fuller, 249 Cal. App. 2d 281, 57 Cal. Rptr. 312 (1967).

5 Cal. Stats. 1963, ch. 1681, § 45(a), p. 3288, provides: "This act applies retroactively to the full extent that it constitutionally can be so applied."

and application to pending cases.[6] Other decisions have since construed the statutes imposing liability upon public entities[7] as well as the various statutes providing immunities and defenses.[8] The act is without a doubt complicated and will be a source of much future litigation.[9]

One of the most significant cases to be decided, surprisingly enough, is not a tort case at all but a contract action.[10] That decision is *City of Salinas v. Souza & McCue Construction Company*,[11] which holds that the collateral source rule[12] does not apply in actions

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[6] *See, e.g.*, Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34 (1967); Heieck & Moran v. Modesto, 64 Cal. 2d 229, 411 P.2d 105 (1966); County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 402 P.2d 868 (1965). For a full treatment of this subject, see Nellis, *Retroactivity of the 1963 California Governmental Tort Law: A Legislative Triumph*, 1 LINCOLN L. REV. 39 (1965).

[7] There are four basic theories of liability imposed by the act. These statutes and representative cases decided thereunder are as follows:

(a) CAL. GOV'T CODE § 815.2 (West 1966) (respondeat superior): Heieck & Moran v. Modesto, 64 Cal. 2d 229, 411 P.2d 105 (1966);

(b) CAL. GOV'T CODE § 815.4 (West 1966) (acts of independent contractor): Van Arsdale v. Hollinger, 68 Cal. 2d 245, 437 P.2d 508 (1968);

(c) CAL. GOV'T CODE § 815.6 (West 1966) (mandatory duty): Akins v. County of Sonoma, 67 Cal. 2d 185, 430 P.2d 57 (1967);

(d) CAL. GOV'T CODE § 835 (West 1966) (dangerous conditions): Pfeifer v. County of San Joaquin, 67 Cal. 2d 177, 430 P.2d 51 (1967).

[8] There are so many immunities provided by the act that it is difficult to classify them in any particular manner. Some of the more frequently encountered immunities and representative cases decided thereunder are as follows:

(a) CAL. GOV'T CODE § 820.2 (West 1966) (discretionary immunity): McCorkle v. Los Angeles, 70 A.C. 262, 449 P.2d 453 (1969); Johnson v. State, 69 A.C. 813, 447 P.2d 352 (1968);

(b) CAL. GOV'T CODE § 830.6 (West 1966) (plan or design immunity): Becker v. Johnston, 67 Cal. 2d 163, 430 P.2d 43 (1967); Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34 (1967);

(c) CAL. GOV'T CODE §§ 850.2, 850.4 (West 1966) (fire protection immunities): Heieck & Moran v. Modesto, 64 Cal. 2d 229, 411 P.2d 105 (1966);

(d) CAL. GOV'T CODE §§ 854.8, 855.8, 856 (West 1966) (mental institution immunities): County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 402 P.2d 868 (1965); Loop v. State, 240 Cal. App. 2d 591, 49 Cal. Rptr. 909 (1966).

[9] In *Sava v. Fuller*, 249 Cal. App. 2d 281, 284, 57 Cal. Rptr. 312, 313 (1967), the following description of the act is worthy of attention:

> As stated in *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, at page 219 [11 Cal. Rptr. 89, 359 P.2d 457]: '[W]hen there is negligence, the rule is liability, immunity is the exception.' The effect of the 1963 legislation, however, is to reverse the formula when a public entity or employee is charged. By section 815 immunity becomes the rule, and we must look to the sections of the act following that section for exceptions. There are many—but with exceptions to the exceptions and exceptions to the exceptions to the exceptions, and so it goes sometimes seemingly ad infinitum to the delight of legal scholars and the despair of lawyers and judges.

[10] By virtue of the express provisions of California Government Code section 814, the act does not affect liability based on contract. *See* E. H. Morrill Co. v. State, 65 Cal. 2d 787, 423 P.2d 551 (1967).

[11] 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967).

[12] "The so-called 'collateral source rule' provides in effect that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." Annot., 7

against public entities. Perhaps even more surprising is the fact that this case has been, for the most part, either ignored or overlooked by legal commentators and practicing attorneys.[13] The purpose of this article is to explore the ramifications of this decision, to discuss its practical effect and operation in suits where a private person or corporation is a codefendant with a public entity, and to speculate as to the future of the rule in view of its real potential to limit the amount of damages recoverable against public entities in tort actions.

CITY OF SALINAS V. SOUZA & MCCUE CONSTRUCTION COMPANY

The City of Salinas contracted with Souza & McCue Construction Company to construct a sewer line. When Souza allegedly breached the contract, the city brought suit and also joined Souza's surety and a supplier of products to Souza as defendants. The contractor cross complained against the city, alleging misrepresentation of soil conditions, and against the supplier, alleging guaranteed performance of the product supplied and a promise to indemnify Souza for any losses.

The trial court found for Souza against the city and all other claims for relief were denied. On appeal, it was held that Souza's damages were improperly determined because the city was not permitted to discover and introduce evidence of a settlement between Souza and the supplier in order to reduce the damages the city would have to pay Souza.

The supreme court stated that the general rule in California is: "When an injured party receives compensation for his losses from a collateral source 'wholly independent of the tortfeasor,' such payment generally does not preclude or reduce the damages to which it is entitled from the wrongdoer."[14]

Then the court observed that the collateral source rule has

A.L.R.3d 519 (1966). The term in its orthodox sense was first used in *Harding v. Town of Townshend*, 43 Vt. 536, 538 (1871).

The application of the collateral source rule to private persons has been exhaustively reviewed and discussed with varying conclusions as to the validity of its underlying justification. *Compare* Maxwell, *Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962) *with* Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966) *and* Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964). *See also* 2 F. HARPER & F. JAMES, TORTS § 25.22 (1956).

[13] The *Souza* case, as it will be referred to throughout this article, was the subject of a brief note in 55 CALIF. L. REV. 1163 (1967) and in York, *Remedies*, CAL. LAW 1967, 298 (1968). On November 8, 1968, the author delivered an address on governmental tort liability at the California Trial Lawyers 4th Annual Lake Tahoe Seminar. The effect of the *Souza* case on the collateral source rule and public entities provoked more comment and discussion than any other topic.

[14] 66 Cal. 2d 217, 226, 424 P.2d 921, 925, 57 Cal. Rptr. 337, 341 (1967).

generally been applied in tort as distinguished from contract cases. After pointing out that some authorities have also applied the rule in contract cases where the breach was tortious in nature, the court held: "It is not necessary, however, that we reach the issue of whether the fraudulent breach of a contract in some settings would justify the application of the collateral source rule as we are compelled to conclude that the rule is not applicable against a public entity . . . ."[15]

The basic rationale of this holding is that the collateral source rule is punitive in nature, and since punitive damages cannot be levied against a public entity,[16] the rule itself does not apply to public entities. Thus, the court concluded: "As we cannot impose on the city any measure of direct damages which are punitive in nature, it necessarily follows that we are foreclosed from doing it by an indirect and collateral route."[17]

As noted above, the decision is surprising since it occurred in a contract case even though its greatest impact will be in the area of governmental tort liability. On the other hand, if *Souza* had been a tort action, it would not have been necessary to deal with the collateral source rule at all. The same end result could have been reached by applying established law relating to payments made by joint or concurrent tortfeasors.

It has long been settled in California that a partial satisfaction of a liability by a joint or concurrent tortfeasor, whether before or after judgment, will result in a pro tanto reduction of the liability of the other tortfeasors.[18] In other words, there is no double recovery for the same wrong and only one complete satisfaction is permissible.[19] Since Souza claimed in its cross-complaint that both the city and the supplier were responsible for its damages, evidence that a payment was made to Souza by the supplier would, under the above principle of tort law, serve to reduce the city's liability correspondingly.

It can be surmised that the supreme court seized upon the opportunity presented by the *Souza* case to establish the inapplicability of the collateral source rule to public entities in recognition

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[15] *Id.* at 227, 424 P.2d at 926, 57 Cal. Rptr. at 342 (citations omitted).

[16] CAL. GOV'T CODE § 818 (West 1966) provides: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

[17] 66 Cal. 2d 217, 228, 424 P.2d 921, 927, 57 Cal. Rptr. 337, 343 (1967).

[18] CAL. CODE CIV. PROC. § 877 (West Supp. 1968); De Cruz v. Reid, 69 A.C. 221, 444 P.2d 342 (1968); Laurenzi v. Vranizan, 25 Cal. 2d 806, 155 P.2d 633 (1945).

[19] 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW (7th ed. 1960) *Torts* § 390, at 1595.

that the issue might not be directly presented to it in a tort action.[20] Be that as it may, the decision serves as another example to encourage attorneys to be bold in challenging the doctrine of stare decisis in any case where prior decisions are either wrong on principle or contrary to modern social or economic policy.

WHAT COLLATERAL SOURCES ARE DEDUCTIBLE?

As already stated, payments made to a plaintiff by one tortfeasor reduce the liability of other joint or concurrent tortfeasors without regard to the collateral source rule. Similarly, a defendant is entitled to a credit or pro tanto reduction for payments made to plaintiff by the defendant himself or by his insurance carrier, as such payments are direct and not collateral sources.[21]

Aside from these non-collateral sources which emanate from the wrongdoers, the most common benefits which a plaintiff may receive can be broadly classified as follows:[22]

1. *Insurance Proceeds.* Various types of insurance may be involved, such as disability insurance (including accident, hospitalization and income protection insurance), life insurance, and fire or property insurance;

2. *Employment Benefits.* Plaintiff may receive salary or other payments from his employer because of accumulated sick leave or vacation time, or he may be entitled to a pension because of his disability;

3. *Gratuities.* These may include services rendered or payments made by public or private charities, by an association of which plaintiff is a member, or by other persons, such as plaintiff's employer, his relatives or friends;

4. *Social Legislation Benefits.* This group includes workmen's compensation, social security and disability compensation under unemployment laws.

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[20] *Compare* County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957) (where a somewhat similar means was used to establish a new rule applicable in condemnation proceedings by making admissible on direct examination of an expert witness evidence of sales prices paid for similar property). In his dissenting opinion in *Faus*, Justice Spence charged that the majority used ". . . a novel type of judicial technique in reaching its conclusion . . . ." *Id.* at 681, 312 P.2d at 686.

[21] Turner v. Mannon, 236 Cal. App. 2d 134, 45 Cal. Rptr. 831 (1965); Dodds v. Bucknum, 214 Cal. App. 2d 206, 29 Cal. Rptr. 393 (1963). This rule has been codified, in part, in CAL. INS. CODE § 11583 (West Supp. 1968).

[22] This classification is used in Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962).

Are all of these collateral sources now deductible in actions against California public entities? If not, which are deductible and which are not? Although the *Souza* case does not directly answer these questions, a strong argument can be made that compensation or benefits of all types received by a plaintiff should be deducted from any award of damages.

It is settled that in tort actions damages are ordinarily awarded only for the purpose of compensating the plaintiff for his actual loss.[23] Thus, it was said in *Valdez v. Taylor Automobile Company*:

> Where, from the nature and circumstances of the case, a rule may be discovered by which adequate compensation may be accurately measured, such a rule should be applied in actions of tort. A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done.[24]

Where a plaintiff has already been compensated in whole or in part for his loss by collateral sources, to allow him to recover again from the wrongdoer does place him in a better position than he would have been had the wrong not been done, *i.e.*, he gets a double recovery. Traditionally, this double recovery has nevertheless been permitted under the collateral source rule on the theory that the wrongdoer should be required to pay as a punitive and preventive measure. However valid the reasons may be for this policy,[25] the *Souza* case clearly holds that it is not permissible where a public entity is the defendant.[26]

What basis is there, then, for refusing to limit plaintiff's damages to the actual loss he has sustained by permitting a deduction for all payments he has received from collateral sources?[27] It has

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[23] CAL. CIV. CODE § 3333 (West 1954); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173 (1967); *see also* RESTATEMENT OF TORTS § 901, comment a (1939); *id.* § 903.

[24] 129 Cal. App. 2d 810, 821-22, 278 P.2d 91, 98 (1954). In this case, defendant failed to obtain an automobile insurance policy on a used car he sold to plaintiff. Plaintiff was involved in an accident and a judgment for $18,465 was rendered against him. He recovered this amount against defendant even though the promised insurance would only have paid a total of $8,465. On appeal, the judgment against defendant was reduced to $8,465 since this was the actual detriment sustained by defendant's tort.

[25] "This punitive damages theory has been described as a historical hangover from the days when torts and crimes were administered by the same court and in the same action." West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 411-12 (1963). Legal commentators appear to be unanimous in agreeing that the refusal to mitigate damages to the extent of collateral benefits in order to punish or deter the wrongdoer cannot be justified. See authorities cited note 12 *supra*.

[26] 66 Cal. 2d 217, 228, 424 P.2d 921, 927, 57 Cal. Rptr. 337, 343 (1967).

[27] In accordance with California Evidence Code section 351, all relevant evidence is admissible except as otherwise provided by statute. Evidence of payments from collateral sources is clearly relevant in this situation to mitigate plaintiff's damages,

been suggested that disallowing a deduction may be justified where plaintiff's loss has been met (1) out of resources that would otherwise have been available to him for other purposes, and (2) by a gift where the intention of the donor is that it shall be in addition to all other recovery.[28] Included in the first category are pensions or annuities that are payable to plaintiff without regard to the disability, salary taken out of sick leave or vacation time that could otherwise be accumulated, and life insurance. Compensation in these situations, like a gift which is intended to be in addition to compensation, is said not to be double in the true sense.[29]

Such a solution, allowing a deduction for some collateral payments but not for others, would have to be worked out on a case by case basis, and it would present some difficult problems of proof, particularly where gifts are involved. For example, suppose an employer voluntarily continues to pay plaintiff's salary during his disability. Should plaintiff nevertheless be allowed to recover for loss of earnings if he can somehow prove that the employer actually intended the gift to be in addition to what plaintiff might recover? And should recovery be denied if this was not the intent or if the intent of the donor was never thought out? Although complicated, this is the present rule in some jurisdictions.[30]

Permitting a deduction for all collateral sources would at least provide a rule which is both logical and easy to apply. Thus, one legal commentator has stated that "[i]f the task of reasoning through to an answer appropriate to the kind of benefit involved is believed too difficult, a general rule confining damages to a compensatory level seems infinitely preferable to its opposite. . . ."[31]

Some unique considerations are presented in the application of the rule under discussion to wrongful death actions, as well as its effect on the right of subrogation.

WRONGFUL DEATH ACTIONS

The statutory and exclusive measure of damages in wrongful death actions in California is what the heirs were receiving at the

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and no statute provides to the contrary. *Compare* CAL. EVID. CODE §§ 1100-56 (West 1966) (evidence affected or excluded by extrinsic policies).

28 2 F. HARPER & F. JAMES, TORTS § 25.22, at 1348 (1956). The authors conclude that the wrongdoer should be allowed a deduction for resources which the plaintiff has a right to receive, but only in the event of the loss caused by the tort, including fire, collision and disability insurance, and benefits from welfare legislation.

29 *Id.* at 1348-49.

30 *Id.* at 1349 nn.28 & 29.

31 Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 753 (1964).

time of the death of the decedent, what the heirs would have received had the decedent lived, and the monetary equivalent of loss of comfort, society and protection.[32] The amount of damages is determined in accordance with the various heirs' separate interests in the deceased's life, and no recovery can be had by an heir who did not sustain a pecuniary loss.[33]

Does an heir actually sustain a pecuniary loss where he has inherited assets from the deceased person which equal or exceed the amount of his separate interest in the deceased's life? It appears that he does not. Yet, the general rule rejects such evidence in wrongful death actions.[34]

The first case in California to consider this question was *McLaughlin v. United Railroads*.[35] Plaintiffs were the children and heirs of a widow who, at the time of her death, successfully operated a drug store and also owned other income property. Defendant admitted liability for the wrongful death but sought to mitigate damages by offering evidence of the inventory and appraisement and decree of final distribution in her estate.

The court pointed out that at common law no right of action existed in favor of any one for wrongful death, and that such actions originated in England by virtue of Lord Campbell's Act. The opinion states:

> The English courts adopted the broad view that whatever of property the plaintiffs could be shown to have received through the death was competent evidence for the consideration of the jury in their effort to determine the amount of damage occasioned by the death. Thus, the English courts held that if a father had nothing and earned nothing and contributed nothing to the support of his family, the heirs' recovery under the statute should be nominal; that if the father's income was from fixed property, wholly independent of his own exertions, and this property went to plaintiffs, this could be shown to lessen the amount of the damages which might otherwise be awarded. Lord Campbell instructed his jury that the amount of an accident policy which the plaintiffs had received should be deducted from any award made to them. He thought that deduction should also be made on account of a regular life insurance policy . . . .[36]

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32 CAL. CODE CIV. PROC. § 377 (West Supp. 1967); Benwell v. Dean, 249 Cal. App. 2d 345, 57 Cal. Rptr. 394 (1967); Stathos v. Lemich, 213 Cal. App. 2d 52, 28 Cal. Rptr. 462 (1963); Cervantes v. Maco Gas Co., 177 Cal. App. 2d 246, 2 Cal. Rptr. 75 (1960).

33 Cross v. Pacific Gas & Elec. Co., 60 Cal. 2d 690, 388 P.2d 353 (1964).

34 Stathos v. Lemich, 213 Cal. App. 2d 52, 28 Cal. Rptr. 462 (1963); Cervantes v. Maco Gas Co., 177 Cal. App. 2d 246, 2 Cal. Rptr. 75 (1960); Wilson v. San Francisco, 106 Cal. App. 2d 440, 235 P.2d 81 (1951). It should be noted that the *Wilson* case, in which the defendant was a public entity, was decided some 16 years before the *Souza* case.

35 169 Cal. 494, 147 P. 149 (1915).

36 *Id.* at 496, 147 P. at 150.

However, the court noted that a majority of courts in the United States follow the diametrically opposite view and exclude all such evidence for the reason that "[t]his rule of evidence has its foundation in the refusal of the court to allow the defendant to benefit by his own wrong, to lessen his responsibility in damages for the injury which he has inflicted, by a showing that, quite fortuitously, through no contribution of defendant's own, the plaintiffs have received a certain pecuniary benefit."[37]

Thus, the evidence was excluded because of the collateral source rule even though it was logically relevant on the issue of damages. Since the *Souza* case has abolished the collateral source rule insofar as public entities are concerned, it would appear to follow that all such evidence should now be admitted to reduce plaintiff's damages.[38]

It might be argued that the proceeds of decedent's estate, including life insurance, should be excluded from consideration in assessing damages since they are resources that would otherwise have been available to plaintiff for other purposes.[39] However, it is highly speculative, that these proceeds, both as to the total amount of the estate that might be accumulated and the proportionate share that a particular heir might inherit, would ever be available to the plaintiff if the decedent had lived. For these reasons, the California rule is that no damages are recoverable for loss of an expected inheritance in a wrongful death action.[40]

Where an heir has actually received an inheritance from the decedent, however, no speculation is involved. Under *Souza,* such an inheritance is therefore relevant to determine the actual pecuniary loss sustained by said heir.[41]

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[37] *Id.* at 498, 147 P. at 151.

[38] The rule is also established in California that evidence of plaintiff's remarriage is excluded in a wrongful death action. The underlying rationale is based, in part, on the collateral source rule. *See* Benwell v. Dean, 249 Cal. App. 2d 345, 57 Cal. Rptr. 394 (1967). This exclusionary rule was recently held applicable to a public entity in *Cherrigan v. San Francisco,* 262 A.C.A. 698, 69 Cal. Rptr. 42 (1968). The opinion cites and relies upon *McLaughlin v. United Railroads,* 169 Cal. 494, 147 P. 149 (1915), but fails to cite or discuss the effect of the *Souza* case on the collateral source rule. The result may nevertheless be justified on the basis that the amount of any deduction would be difficult to compute since it is highly speculative to compare the prospective earnings, services and contributions of the deceased spouse with those of the new spouse.

[39] See authority cited note 28 *supra.*

[40] Burk v. Arcata & M.R.R.R. Co., 125 Cal. 364, 57 P. 1065 (1899); Bradford v. Brock, 140 Cal. App. 47, 34 P.2d 1048 (1934). *But see* Griffey v. Pacific Elec. Ry. Co., 58 Cal. App. 509, 209 P. 45 (1922).

[41] This evidence may also be relevant on other issues. In *Stathos v. Lemich,* 213 Cal. App. 2d 52, 28 Cal. Rptr. 462 (1963), a copy of the inventory and appraisal of decedent's estate was held admissible in evidence, not to reduce damages, but to rebut the testimony of the heirs regarding expected large sum gifts from decedent.

SUBROGATION RIGHTS

In abolishing the collateral source rule in actions against public entities, did the *Souza* case also thereby preclude subrogation by a third party who has compensated the plaintiff? Obviously, there is no double recovery in this situation since the plaintiff recovers only from the third party and the latter then recovers from the public entity. The answer to this question depends upon a number of factors.

Initially, it is important to observe that there is no right of subrogation in California in actions for personal injuries or wrongful death, except where such right has been expressly granted by statute.[42] Therefore, the effect of *Souza* upon subrogation is limited to those cases where a right of subrogation is otherwise recognized under general law or where a specific statute controls. The most common situations are an insurer's right of equitable subrogation for property damages,[43] and an employer's or his insurer's statutory right of subrogation for workmen's compensation benefits.[44] The first problem to consider is whether public entities may be liable in such subrogation actions, without regard to the *Souza* case.

As pointed out above, California public entities are not liable in tort except as provided by statute and all common law and judicially declared forms of liability have been abolished.[45] Since an insurer's right of subrogation for property damages is an equitable non-statutory cause of action, it is questionable whether public entities are liable for subrogation in such cases.[46]

On the other hand, California Labor Code section 3852 does provide for subrogation against any "person" other than the employer for workmen's compensation benefits. Although the word "person" in a statute does not ordinarily include public entities where such a construction would infringe upon sovereign governmental powers,[47] California Labor Code section 3210 defines "person" as including public and quasi-public corporations.[48]

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42 CAL. PROB. CODE § 573 (West Supp. 1968); Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073 (1960); Peller v. Liberty Mut. Fire Ins. Co., 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963); *cf.* Block v. California Physicians' Serv., 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (1966).

43 Offer v. Superior Court, 194 Cal. 114, 228 P. 11 (1924); Patent Scaffolding Co. v. William Simpson Constr. Co., 256 Cal. App. 2d 506, 64 Cal. Rptr. 187 (1967).

44 CAL. LABOR CODE § 3852 (West 1955); CAL. INS. CODE § 11662 (West 1955).

45 See authorities cited note 4 *supra*.

46 See cases cited note 43 *supra*. There is no statute which makes public entities liable for subrogation in property damage actions.

47 *Compare* Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331 (1962).

48 This definition of "person" does not appear to include the State of California itself or counties since neither are properly classified as public corporations. *See, e.g.*, Vagim v. Board of Supervisors, 230 Cal. App. 2d 286, 40 Cal. Rptr. 760 (1964); *see*

Assuming for purposes of discussion that public entities can otherwise be liable in subrogation actions,[49] does the *Souza* case change this result? If the reason for the decision is merely to prevent a double recovery by plaintiff himself, then subrogation actions are probably not barred thereby.[50] But the rationale of *Souza* is not so limited. Rather, its avowed purpose is to prevent the levying of punitive damages upon public entities, either directly or indirectly.[51]

It appears that permitting subrogation against a public entity is an indirect way of imposing punitive damages. An analogous situation arose in *Patent Scaffolding Company v. William Simpson Construction Company*.[52] The question was whether an insurer who compensated Patent for a fire loss was subrogated to Patent's cause of action against Simpson, a general contractor who had breached a contractual duty to either indemnify Patent for fire losses or to procure fire insurance for Patent's benefit.

The court pointed out that a necessary element for equitable subrogation is that justice requires that the loss be shifted and that the equitable position of the party to be charged is inferior to that of

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also Bettencourt v. I.A.C., 175 Cal. 559, 166 P. 323 (1917). *Compare* the much broader definition of "public entity" contained in California Government Code section 811.2. The only two cases discovered which involve subrogation against public entities for workmen's compensaton benefits are *Sacramento v. Superior Court*, 205 Cal. App. 2d 398, 23 Cal. Rptr. 43 (1962), and *Paolini v. San Francisco*, 72 Cal. App. 2d 579, 164 P.2d 916 (1946). The application of California Labor Code section 3852 to public entities is not discussed as an issue in either case. Moreover, both cases involved cities, which are considered to be public corporations. *See* Blum v. San Francisco, 200 Cal. App. 2d 639, 19 Cal. Rptr. 574 (1962).

[49] It should be noted that, apart from the question of whether public entities may be *substantively* liable in subrogation actions, certain procedural requirements are applicable. California Government Code sections 905 and 905.2 specify that claims for money or damages must be presented to the State and local public entities, and section 910 requires that such claims be presented by the claimant or a person acting on his behalf. This would appear to require a claim to be filed by the subrogee in addition to the claim filed by the injured party (subrogor). *See* Limited Mut. Comp. Ins. Co. v. Billings, 74 Cal. App. 2d 881, 169 P.2d 673 (1946), and Los Angeles v. Howard, 80 Cal. App. 2d 728, 182 P.2d 278 (1947) (wherein the right of subrogation under California Labor Code section 3852 was held to be a separate and distinct cause of action from the right of action of the injured employee); *see also* Fidelity & Cas. Co. v. McMurry, 217 Cal. App. 2d 767, 32 Cal. Rptr. 243 (1963) (holding that a workmen's compensation insurance carrier is barred by the failure to file a timely claim against an estate under California Probate Code section 707).

[50] *See, e.g.*, Smith v. Trapp, 249 Cal. App. 2d 929, 58 Cal. Rptr. 229 (1967) (where it is said that California Labor Code section 3852 should not be construed to provide for double recovery). On the other hand, it has been said that the reason for allowing subrogation is to prevent the plaintiff from making a double recovery. W. VANCE, INSURANCE 104, 790 (3d ed. 1951). Since the *Souza* case precludes that possibility, it is arguable that subrogration should not be allowed against public entities for this reason. CAL. CIV. CODE § 3510 (West 1954) provides: "When the reason of a rule ceases, so should the rule itself."

[51] See notes 16 and 17 *supra*, and accompanying text.

[52] 256 Cal. App. 2d 506, 64 Cal. Rptr. 187 (1967).

the subrogee.[53] Where the party to be charged actually causes the loss, subrogation is proper. But since the loss involved was caused by the fire, not by the failure to procure fire insurance, it was held that subrogation must be denied, the court stating:

> Upon the facts in this case no public policy is perceivably served by shifting the entire loss from the insurers to Simpson. The shifting of loss is not a deterrent to wrongdoing, as it may be in cases permitting subrogation against a tortfeasor. (*City of Salinas* v. *Souza & McCue Constr. Co., Inc., supra*, 66 Cal. 2d at p. 227.) Imposition of the loss upon Simpson would be punitive, and punishment is not the objective of contractual damages. (*City of Salinas* v. *Souza & McCue Constr. Co., Inc., supra;* see also *United Protective Workers* v. *Ford Motor Co., supra,* 223 F. 2d at p. 54; *In re Future Mfg. Coop., Inc., supra*, 165 F. Supp. 111, 113.) If subrogation were permitted, the insurers who have accepted premiums to cover the very loss which occurred receive a windfall. . . .[54]

The same reasoning would preclude subrogation against public entities in tort actions. As pointed out in the *Souza* case, a public entity necessarily acts through public officials and representatives. Where a tort is committed by one of the latter and an action is brought against the public entity, the loss falls upon innocent taxpayers rather than on the actual wrongdoer.[55] Since the party to be charged has not caused the loss where a public entity is the defendant, no public policy is served by allowing subrogation.[56]

Method of Allowing the Credit for Payments From Collateral Sources

The proper method of allowing the credit for payments from collateral sources was not answered by the *Souza* case. The issue is whether it should be done by the jury in assessing damages or by the court after the plaintiff's total damages have first been determined by the jury.

Relevant authority for the solution to this problem may be found in the California cases relating to the manner of allowing credit for an amount paid by one tortfeasor in an action by plaintiff against another tortfeasor. In *Steele v. Hash*,[57] the trial court instructed the jury that a codefendant had paid plaintiff two thousand

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[53] *Id.* at 509, 64 Cal. Rptr. at 190.

[54] *Id.* at 515-16, 64 Cal. Rptr. at 194.

[55] 66 Cal. 2d 217, 228, 424 P.2d 921, 926, 57 Cal. Rptr. 337, 342 (1967).

[56] In 2 F. Harper & F. James, Torts § 25.23 (1956), the authors conclude that where a claimant has been compensated from collateral sources, the interests of society will generally be served best by denying subrogation. One of the reasons advanced is that subrogation is an inappropriate weapon for punishment.

[57] 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963).

dollars in settlement, and that this amount should be deducted by the jury from the verdict, if the jury found for the plaintiff. Plaintiff contended that this procedure was error on the ground that the jury might conclude that plaintiff, having already received compensation which he must have regarded as adequate, is not entitled to further damages. The court rejected this argument, stating:

> [A]ppellant's contention that the court ought to have treated the question of a prior settlement or release as a question of law finds no support in the authorities. Appellant has been unable to cite one decision indicating that a trial court is empowered to withhold certain evidence from the jury, allow them to arrive at a verdict, and thereafter reduce the verdict on the basis of evidence which the jury was not permitted to consider. To the contrary, the California cases have repeatedly stated that the question is one for the jury. . . .[58]

However, a subsequent decision in *Cseri v. D'Amore*[59] held that it was not prejudicial error to refuse to admit evidence of a settlement where the court made the deduction after the jury verdict. *Steele v. Hash* and other cases were distinguished on the ground that they only decided that it was not error to submit the issue to the jury. It can be seen from the language quoted above that *Steele* actually decided more than that. The opinion clearly states that the trial court is not empowered to withhold such evidence from the jury.[60]

There is also a conflict of authority in other states as to how this problem should be handled.[61] Some cases hold that the credit is to be given by the jury and not by the court, while other cases hold that the matter is for the jury only where there are questions of fact to be determined.[62] The parties may, of course, stipulate to either procedure.

Payments from collateral sources, unlike a settlement with another tortfeasor, ordinarily compensate plaintiff for his special damages only. Since juries often fix the amount of general damages in

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[58] *Id.* at 3-4, 27 Cal. Rptr. at 854. The *Steele* case was followed in *Hanley v. Lund*, 218 Cal. App. 2d 633, 32 Cal. Rptr. 733 (1963), where the defendant complained that he was prejudiced by this procedure. The same procedure was also approved in *Magee v. Wyeth Laboratories, Inc.*, 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963), although *Steele* was not cited therein. It is interesting to notice that cases involving payments from collateral sources were distinguished in *Wyeth* on the ground that such payments are not admissible in evidence.

[59] 232 Cal. App. 2d 622, 43 Cal. Rptr. 36 (1965).

[60] The *Steele* case also cited and quoted from *Wiley v. Easter*, 203 Cal. App. 2d 845, 21 Cal. Rptr. 905 (1962), stating that the jury "had a right to know" of such payments made by another tortfeasor. The holding in *Cseri v. D'Amore*, 232 Cal. App. 2d 622, 43 Cal. Rptr. 36 (1965), was questioned in *Granville v. Parsons*, 259 A.C.A. 302 n.4, 66 Cal. Rptr. 149 n.4 (1968).

[61] Annot., 94 A.L.R.2d 352 (1964).

[62] *Id.* at 360-89.

accordance with some ratio to the special damages, it would appear that the jury has a right to know the net amount of plaintiff's special damages, *i.e.*, the extent to which the special damages have been paid by collateral sources.[63]

The mechanics of allowing the credit for collateral payments become rather complex when a public entity is a codefendant with one or more private defendants, as discussed hereinafter. Therefore, it would appear advisable to instruct the jury that plaintiff has received certain sums in a specified amount from collateral sources; that the public entity defendant is entitled to a credit for these payments; but that the jury should determine the full amount of the plaintiff's damages, leaving the deduction for the collateral payments to the court. The verdict form itself should recite that the damages represent the total or gross damages without any deduction for payments from collateral sources. In this way, the verdict will not be ambiguous, the trial court will be able to give the credit to the public entity, and a proper judgment can be entered on the verdict.[64]

MECHANICS OF ALLOWING THE CREDIT FOR PAYMENTS FROM COLLATERAL SOURCES, DIRECT SOURCES, AND OTHER TORTFEASORS

The problems involved and the proper solutions thereto can best be illustrated by using a number of examples of typical situations which may be expected to arise in practice.

Example 1. Plaintiff sues a public entity and proves damages in a total amount of $50,000. The public entity introduces evidence that plaintiff has received $10,000 from collateral sources. In this

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[63] The contention of plaintiff that admitting evidence of compensation from collateral sources was prejudicial, as a matter of law, was rejected in *Garfield v. Russell*, 251 Cal. App. 2d 275, 59 Cal. Rptr. 379 (1967). The evidence was not offered to reduce plaintiff's damages but as affecting her credibility as a witness, the court stating:

> Evidence that a plaintiff is being wholly or partially compensated for her medical expenses—or perhaps even making money every time she sees her doctor—may obviously be relevant on her motives in seeking medical help and her credibility as a witness, even if only remotely. . . . *Id.* at 278, 59 Cal. Rptr. at 381.

[64] CAL. CODE CIV. PROC. § 664 (West Supp. 1968). *Compare* Woodcock v. Fontana Scaffolding & Equip. Co., 69 A.C. 467, 445 P.2d 881 (1968). The jury's verdict found that both the defendant and plaintiff's employer were negligent and assessed damages in the sum of $13,000. Relying on *Witt v. Jackson*, 57 Cal. 2d 57, 366 P.2d 641 (1961), the court held that the employer was not entitled to recover for workmen's compensation benefits paid plaintiff in the amount of $4,311.76, and that the defendant was entitled to a credit in that amount. However, the verdict was ambiguous in not specifying whether the $13,000 was the gross or net amount of damages. The supreme court interpreted the verdict in light of the pleadings, evidence and instructions, holding that the $13,000 was a gross amount, and the judgment was ordered reduced to $8,688.24.

simple case, the court may either instruct the jury to deduct $10,000 and return a verdict for the net amount of damages ($40,000), or the court may instruct the jury to determine the full amount of plaintiff's damages and thereafter make the deduction itself. In either case, a judgment is entered for $40,000.

Example 2. Assume the same facts as in the above example except that the public entity introduces evidence that plaintiff has also received $5,000 in settlement from another tortfeasor. Here again, either the jury or the court may make the deduction of $15,000 and a judgment is entered for $35,000.

Example 3. Plaintiff sues a public entity and defendant, a private person, and proves damages in a total amount of $50,000. The public entity introduces evidence that plaintiff has received $10,000 from collateral sources. The court instructs the jury regarding the amount of the collateral source but requires the jury to determine the full amount of plaintiff's damages in a single verdict against both defendants. The judgment entered on the verdict will be in the amount of $50,000, and should recite that the liability of the public entity is limited to $40,000 in order to give effect to the credit of $10,000 received by plaintiff from collateral sources.[65]

Applying the statutory rule of contribution among joint tortfeasors, the public entity would be entitled to recover $20,000 from defendant after it has discharged the joint judgment of $40,000.[66] Plaintiff would be required to recover the balance of his judgment, *i.e.*, $10,000, directly from defendant.[67]

Example 4. Plaintiff sues a public entity and defendant 1 and defendant 2, both private defendants, and proves damages in a total amount of $50,000. The public entity introduces evidence that plaintiff has received $10,000 from collateral sources not including the

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[65] CAL. CODE CIV. PROC. § 578 (West 1955). This is essentially the same procedure employed in tort actions against the owner and operator of a vehicle where the liability of the owner is limited by California Vehicle Code section 17151. In such cases, one verdict should be rendered in a single sum, and the statutory limitation of liability applicable to the owner is incorporated in the judgment entered on the verdict. Aynes v. Winans, 33 Cal. 2d 206, 200 P.2d 533 (1948); Sparks v. Berntsen, 19 Cal. 2d 308, 121 P.2d 497 (1942); Westcott v. Hamilton, 202 Cal. App. 2d 261, 20 Cal. Rptr. 677 (1962); Harbor Ins. Co. v. Paulson, 135 Cal. App. 2d 22, 286 P.2d 870 (1955); *see also* Mixon v. Riverview Hosp., 254 Cal. App. 2d 364, 62 Cal. Rptr. 379 (1967), reviewing numerous cases involving separate verdicts against joint tortfeasors.

[66] CAL. CODE CIV. PROC. §§ 875-80 (West Supp. 1968). This statutory system for contribution may be enforced only after entry of judgment and where one tortfeasor discharges the joint liability or has paid more than his pro rata share. Augustus v. Bean, 56 Cal. 2d 270, 363 P.2d 873 (1961).

[67] The end result of this example is that plaintiff receives a total of $50,000, of which amount the public entity pays $20,000 and the private defendant pays $30,000. In this way, the public entity but not the private defendant receives the advantage of the credit of $10,000 received by plaintiff from collateral sources.

amount of $1,000 which defendant 1 establishes that plaintiff has received from defendant 1's insurance carrier. The court instructs the jury regarding the $11,000 already received by plaintiff but requires the jury to determine the full amount of plaintiff's damages in a single verdict against all three defendants. The judgment entered on the verdict will be in the amount of $50,000, and should recite that the liability of the public entity is limited to $39,000 in order to give effect to the credit of $11,000 received by plaintiff from collateral sources. In addition, the judgment should recite that defendant 1 has already discharged the judgment to the extent of $1,000, the amount paid to plaintiff by defendant 1's insurance carrier.[68]

Applying the statutory rules of contribution as in the last example, the public entity would be entitled to recover $13,000 each from defendant 1 and defendant 2 after paying plaintiff the $39,000 joint judgment. Plaintiff would then be required to recover the balance of his judgment, *i.e.*, $11,000, from defendant 1 and defendant 2. Since this amount is also subject to contribution, defendant 1 and defendant 2 would each owe one half thereof or $5,500, with defendant 1 being entitled to a credit for the $1,000 already paid to plaintiff by his insurance carrier.[69]

Example 5. Assume the same facts as in example 4 except that plaintiff also received before trial a settlement in the amount of $3,000 from defendant 3, another private tortfeasor. The court instructs the jury regarding the $11,000 from collateral sources as well as the $3,000 from defendant 3 but the jury is required to determine the full amount of plaintiff's damages in a single verdict against the public entity, defendant 1 and defendant 2. The judgment entered on the $50,000 verdict will be in the amount of $47,000, to give credit to the $3,000 settlement already received by plaintiff from defendant 3.[70] The judgment should recite that the liability of the public entity is limited to $36,000 ($47,000 less $11,000) and that defendant 1 has discharged the judgment to the extent of $1,000.

Under the contribution statute, the public entity would be entitled to recover $12,000 each from defendant 1 and defendant 2

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[68] The $1,000 paid by defendant 1's insurance carrier is a collateral source insofar as the public entity and defendant 2 are concerned. Defendant 2 is not entitled to credit for it because of the collateral source rule, but the public entity is entitled to credit under the *Souza* case. Defendant 1 is also entitled to credit for this amount because it is a direct payment to plaintiff by his insurance carrier and not a collateral source as to defendant 1. CAL. INS. CODE § 11583 (West Supp. 1968).

[69] The end result of this example is that plaintiff receives a total of $50,000, as follows: $13,000 from the public entity; $18,500 from defendant 2 ($13,000 plus $5,500); and $18,500 from defendant 1 ($13,000 plus $4,500 under the judgment plus $1,000 from defendant 1's insurance carrier).

[70] Note that the public entity as well as defendant 1 and defendant 2 are entitled

after discharging the joint judgment of $36,000. Plaintiff would be required to recover the $11,000 balance from defendant 1 and defendant 2 as in example 4.[71]

CONCLUSION

The decision of the supreme court in *City of Salinas v. Souza & McCue Construction Company* has provided a potent weapon in the arsenal of defenses available to public entities in tort litigation. In abolishing the collateral source rule, the door has apparently been opened for public entities to mitigate damages by introducing evidence of and obtaining a credit for all payments received by plaintiff from collateral sources. The new rule would appear to be applicable to compensation or benefits of any kind, including insurance, employment benefits, gratuities and social legislation benefits. Even the proceeds of the decedent's estate may be deductible in wrongful death actions.

In addition to precluding the possibility of a double recovery by plaintiffs, the *Souza* case has its impact upon other persons as well. Subrogation actions against public entities appear to be barred since the shifting of the loss from an insurer to innocent taxpayers is essentially punitive in nature. Other private tortfeasors are also affected as the allowance of the credit to the public entity necessarily results in an increase in their pro rata share of the entire judgment.

It appears probable that the legislature will act in order to clarify the law and specify the extent to which a plaintiff's damages may be mitigated because of the receipt of compensation or benefits from collateral sources. The California Law Revision Commission, as a part of its authorization to study the doctrine of governmental immunity,[72] has recently determined to review the impact of the *Souza* case with a view to submitting recommendations to the legislature.[73]

Pending the enactment of such legislation, attorneys and trial judges must endeavor to work out solutions to problems within the framework of the *Souza* case. It may well be that, in the interim, further clarification will be forthcoming from the appellate courts.

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to credit for the amount of the settlement made by plaintiff and defendant 3. CAL. CODE CIV. PROC. § 877 (West Supp. 1968). Therefore, as in example 2, the judgment entered on the verdict is reduced accordingly.

[71] The end result of this example is that plaintiff receives $50,000, as follows: $12,000 from the public entity; $17,500 from defendant 2 ($12,000 plus $5,500); $17,500 from defendant 1 ($12,000 plus $4,500 under the judgment plus $1,000 from defendant 1's insurance carrier); and $3,000 from defendant 3 by way of a settlement.

[72] Cal. Stats. 1957, Resolution ch. 202.

[73] Minutes of the Cal. Law Revision Comm'n for January 9, 10 and 11, 1969.